

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re: § **Case No. 14-30699-hdh-11**
§
BUFFET PARTNERS, L.P., et al. § **Chapter 11**
§
Debtors. § **Jointly Administered**

**Hearing: March 4, 2014
10:00 a.m.**

**SAMP 2, LLC'S OBJECTION TO DEBTORS' EMERGENCY [FIRST] MOTION TO
REJECT UNEXPIRED LEASES OF NON-RESIDENTIAL REAL PROPERTY AND
RELATED EQUIPMENT LEASES PURSUANT TO 11 U.S.C. § 365
NUNC PRO TUNC TO THE PETITION DATE (Docket No. 9)**

COMES NOW SAMP 2, L.L.C. ("SAMP"), a creditor and lessor of the Debtors in the above captioned and numbered bankruptcy case ("Bankruptcy Case"), and files this Objection ("Objection") to Debtors' Emergency [First] Motion to Reject Unexpired Leases of Non-Residential Real Property and Related Equipment Leases Pursuant to 11 U.S.C. § 365 *Nunc Pro Tunc* to the Petition Date ("Motion") (Docket No. 9) and in support thereof would show the Court as follows:

BACKGROUND

1. On February 4, 2014 (the "Petition Date"), Debtors filed voluntary petitions under Chapter 11 of the Bankruptcy Code in this Bankruptcy Court. Debtors are continuing in possession of their business and property as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

2. On the same day, Debtors filed their Emergency [First] Motion to Reject Unexpired Leases of Non-Residential Real Property and Related Equipment Leases Pursuant to 11 U.S.C. § 365 *Nunc Pro Tunc* to the Petition Date.

3. On February 14, 2014, Debtors filed their Supplement [Request to Abandon

Property] to Motion to Reject Certain Leases (Docket No. 74).

4. SAMP is the lessor on a non-residential real property lease that Debtors seek to reject for the property located at 7863 S Interstate 35, San Antonio, Texas 78224 (the “Property”). The Property is one of the restaurants that Debtors have concluded is not profitable and Debtors seek in their Motion to reject the lease *nunc pro tunc* to the Petition Date.

5. SAMP purchased the Property on December 17, 2013 from Sanzarnn, LLC. The lease between Sanzarnn, LLC and Debtor, Buffet Partners, L.P. (“Lease”) was assigned to SAMP on the same day (the “Lease”). SAMP has received no lease payments from Debtors since the Property was purchased and has had to expend significant sums of money as a result of Debtors failure to honor its obligations under the Lease, including, *inter alia*, the 2013 property taxes in the amount of \$84,538.35 and a utility deposit in the amount of \$13,200.00.

OBJECTION TO RETROACTIVE REJECTION

6. Debtors claim they abandoned the Property in mid-January of 2014 when it closed the restaurant it operated there. However, Debtors did not vacate the Property and have not to date. Most, if not all, of the furniture, trade fixtures and equipment on the Property was leased by Debtors. Debtors left all of the furniture, fixtures and equipment in the premises as well as its personality, where it all remains as of this date.

7. SAMP was informed by Debtors that it would be contacted by third-party vendors for entry into the Property to retrieve their respective leased property. To date, the only vendor who has retrieved its property is Pepsi, which retrieved a soft drink dispenser.

8. Contrary to Debtors’ assertions in its Supplement [Request to Abandon Property] to Motion to Reject Certain Leases, the furniture, fixtures and equipment left in the Property are not inconsequential and is a greater burden to SAMP than it is to Debtors. Further, its precludes SAMP

from entering into an agreement to relet the premises after rejection because of the detritus of Debtors' abandonment. In short, in addition to the sums that Debtor should be paying to SAMP and is not, SAMP is incurring the costs of Debtors using its Property as a *de facto* storage unit. Moreover, they are doing so without an offer of payment for the use of the Property as a storage facility.

9. SAMP does not oppose the Debtors' rejection of its lease. It objects to Debtors' proposed retroactive rejection of the Lease with SAMP when they have not yet vacated the premises.

10. SAMP requests that an order approving the rejection of the Lease should not be entered or effective until Debtors totally vacate the Property by removing the personal property therein.

ARGUMENTS AND AUTHORITIES

11. As stated by this Court, "[t]he general rule in this Circuit is that the effective date of a rejection is the date of the entry of the bankruptcy court's order approving lease rejection." *In re Cafeteria Operators, L.P.*, 299 B.R. 384, 394 (Bankr. N.D. Tex. 2003). This Court also recognized that "nothing precludes a bankruptcy court, based on the equities of the case, from approving the ... rejection of a non-residential real property lease retroactively to an earlier date." 299 B.R. at 394 quoting *In re Amber's Stores, Inc.*, 193 B.R. 819, 826-27 (Bankr. N.D. Tex. 1996). In *Cafeteria Operators, L.P.*, this Court permitted the retroactive rejection of leases of certain restaurant locations operated by the debtor because the debtor had vacated the restaurants prior to the petition date.

12. In a case on point, Judge Houser refused to allow retroactive rejection of a lease in *In re Romacorp, Inc.*, 2006 Bankr. LEXIS 4677 (Bankr. N.D. Tex., Feb. 24, 2006). In that case, as

in the case here, the debtor left personal property in the leased space. The debtor in *Romacorp* did not seek to abandon the property under section 554 of the Bankruptcy Code until the date of the hearing. Judge Houser pointed out that the lessors were unable to make use of the space by either removing the personal property or re-letting the premises along with the personal property without first seeking relief from the automatic stay imposed by section 362 of the Bankruptcy Code. As stated by Judge Houser, “[t]he Court cannot require the Lessors to guess as to whether or not the Debtor truly rejected the Coral Springs Lease; to do so would be inequitable and place an onerous and unnecessary burden upon the Lessors. Before the Court should grant the extraordinary equitable remedy of retroactive rejection, something more than the Debtor's business judgment must be shown.” *2006 Bankr. LEXIS* at *15.

13. Here, Debtors filed a Supplement to their Motion indicating their intention to abandon property left in the various leaseholds on February 14, 2104. However, Debtors, in the Supplement, referred to the property they were intending to abandon as “inconsequential” or “burdensome to the estate”, without listing any of the specific property. In SAMP's case, Debtors left everything. A restaurant completely outfitted with tables, chairs, dishware, glassware, serving buffets, etc., is hardly personal property that is “inconsequential”. As in *Romacorp*, allowing retroactive rejection of the Lease would place an onerous and unnecessary burden upon SAMP.

14. The effective date of the rejection of SAMP's lease should be the date Debtors vacate the Property by removing all of the personal property that remains.

WHEREFORE, SAMP 2, LLC, prays that the Debtors' Emergency [First] Motion to Reject Unexpired Leases of Non-Residential Real Property and Related Equipment Leases Pursuant to 11 U.S.C. § 365 *Nunc Pro Tunc* to the Petition Date be denied as to the retroactive rejection and that Debtors not be permitted to reject its Lease with SAMP until it has removed all the personality that

belongs to it or its third party vendors and/or lessors. SAMP also requests such other and further relief as this Court may deem just.

DATED: February 28, 2014.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that a copy of foregoing was served by email or First Class Mail as shown on the attached Master Service List attached. In addition, the foregoing document was served on those parties set forth below either by email or by First Class Mail, postage prepaid and properly addressed, on February 28, 2014.

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